UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
THEODORE CARLTON RICHARDSON,	)	Case No. 94-00324
	)	(Chapter 7)
Debtor.	)	

DECISION RE DEBTOR'S MOTION TO RECONSIDER
ORDER GRANTING RELIEF FROM DISCHARGE ORDER

The debtor's motion to reconsider raises several issues: (1) the effect of the statutory deadline for revoking a discharge; (2) the court's jurisdiction to modify the discharge injunction; (3) the effect of the Florida court proceeding possibly being barred by the Florida statute of limitations; and (4) whether the debtor ought not be subjected to the default status he had suffered prior to bankruptcy in the state court proceeding against him. The motion is one under F.R. Civ. P. 60 (because made more than 10 days after entry of the court's order), but the motion would be insufficient even under F.R. Civ. P. 59.

I

Under the Bankruptcy Act, the passage of the deadline for seeking to vacate a discharge did not bar a later motion to modify the discharge injunction. Grand Union Equipment Co., Inc. v. Lippner, 167 F.2d 958, 960 (2d Cir. 1948). The same result applies under the Bankruptcy Code. As stated in In re Hendrix, 986 F.2d 195, 198 (7th Cir. 1993):

> Discharge brought into existence a perpetual injunction, making the bankruptcy proceeding a continuous, ongoing proceeding as to anyone bound by the injunction. 11 U.S.C. §§ 524(a)(2), (3); cf. Transgo, Inc. v. AJAC Transmission Parts Corp., 768

> F.2d 1001, 1030 (9th Cir. 1985). And although the Bankruptcy Code does not expressly authorize the modification of a discharge, as distinct from its revocation, 11 U.S.C. § 727(d), which is equivalent to the dissolution of the section 524 injunction created by the discharge, any court that issues an injunction can modify it for good cause on the motion of a person adversely affected by it. Transgo, Inc. v. AJAC Transmission Parts Corp., supra, 768 F.2d at 1030; Winterland Concessions Co. v. Trela, 735 F.2d 257, 260 (7th Cir. 1984).

Accord, In re Shondel, 950 F.2d 1301, 1308-09 (7th Cir. 1991); In re Walker, 927 F.2d 1138, 1142-44 (10th Cir. 1991); In re Winterland, 142 B.R. 289, 292 (C.D. Ill. 1992); In re Dorner, 125 B.R. 198, 202 (Bankr. N.D. Ohio 1991); In re McGraw, 18 B.R. 140, 143 (Bankr. W.D. Wis. 1982).

II

Plainly this power of modification carries with it the jurisdiction to exercise the power. See Hawxhurst v. Pettibone Corp., 40 F. 3d 175, 179-180 (7th Cir. 1994) ("the bankruptcy court retained jurisdiction to modify the discharge injunction under Hendrix, 986 F.2d at 197-98, and Shondel, 950 F.2d at 1308-09" (footnote omitted)).

III

Richardson's contention that the Florida proceeding is barred by the Florida statute of limitations is an issue he may raise in the Florida proceeding. It is not appropriate for this court to decide that issue.

IV

The debtor claims that the Florida state court will not permit him to defend against liability for the debt because he

was previously defaulted in the Florida court. This is entirely speculative at this juncture. The court doubts that the plaintiff will attempt to enforce the prior default or that the Florida court would decline to let Richardson defend as to liability.

Certainly this court did not envision that Richardson would be barred from trying the issue of liability. That is because, as far as the goal intended by the abatement of the adversary proceeding to determine nondischargeability, it would do little good for the Florida court to proceed by way of default as to liability. I assume that the United States Bankruptcy Court for the Middle District of Florida intended for the question of liability to be fixed by a ruling that would have collateral estoppel effect on issues of nondischargeability (assuming that the Florida liability provisions include necessary elements that are identical to the elements ofo nondischargeability under 11 U.S.C. § 523(a)). That will not occur if the Florida state court proceeds by way of default. As stated in City of Anna Maria v. Miler, 91 So.2d 333, 334 (Fla. 1956) (en banc):

> When the second suit is on a different cause, however, it has been held that the former suit operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Gray v. Gray, 91 Fla. 103, 107 So. 261. Donahue v. Davis, Fla., 68 So.2d 163. See Cromwell v. County of Sac, 94 U.S. 351, 24 L.E.2d 195.

In other words, an issue not raised by defense, and actually tried and adjudicated, is not entitled to collateral estoppel effect, such that a default judgment as to liability is entitled

to no collateral estoppel effect. Southern Title Research Co. V. King, 186 So.2d 539, 544 (Dist. Ct. Appeal Fla. 1966).

To the extent that the Florida state court proceeds by way of default as to liability, there is no danger that the plaintiff could successfully raise the judgment as collateral estoppel as to issues of liability in the nondischargeability proceeding. If the plaintiff attempted to do so in the nondischargeability proceeding, there would be time enough to seek to modify this court's order modifying the discharge injunction to decree that the modification does not permit issues of nondischargeability to have been fixed by way of default judgment as to liability in the Florida state court proceeding.

But until the Florida state court has even rejected a request by the debtor to be permitted to defend against liability despite the prior default, it is premature to consider this matter.

Dated: December 4, 2000.

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S. Martin Teel, Jr.
United States Bankruptcy Judge

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